No. 08-687

In the Supreme Court of the United States

RUSSELL WAYNE HUNT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly vacated petitioner's sentence and remanded for resentencing because the sentencing court had relied in part on a factual finding that was contrary to the jury's verdict.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B48) is reported at 521 F.3d 636.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2008 (Pet. App. C1). A petition for rehearing was denied on August 22, 2008 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on November 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of conspiracy to commit health care fraud, in violation of 18 U.S.C. 371; six counts of health care

fraud, in violation of 18 U.S.C. 1347; and five counts of making false statements relating to health care matters, in violation of 18 U.S.C. 1035. He was sentenced to five years of probation and was ordered to pay a $6000 fine and $151,161.78 in restitution. Pet. App. B2. The court of appeals affirmed petitioner's convictions, but vacated his sentence and remanded for resentencing. *Id.* at B1-B48.

1. Petitioner, a licensed physician, was hired by Mark Noble to review medical history questionnaires filled out by patients and to sign orders for the patients to undergo carotid artery ultrasound tests performed by Noble's diagnostic testing companies. Medicare and private insurers compensated the companies only for diagnostic tests that had been determined to be medically necessary by a treating physician, or by a nurse practitioner or physician's assistant working under the license of a treating physician. Noble brought petitioner medical history questionnaires and orders after the tests had already been performed, and petitioner signed the orders without having seen or examined the patients. Petitioner collected a $10 fee from Noble for each signature, and he submitted insurance claims for his "consultations" with patients, using a billing code that required a face-to-face examination of the patient. Pet. App. B3-B6; Gov't C.A. Br. 4-11.

After federal agents began to investigate Noble and his companies, petitioner falsely told the agents that he had not been paid $10 per signed order, and that all of the tests had been ordered before they were performed. Petitioner also claimed that a nurse practitioner working under his license had examined the patients, although he admitted that he had never met the nurse

practitioner, did not know that person's name, and had not confirmed his or her credentials. Pet. App. B6.

2. A federal grand jury in the Middle District of Tennessee returned an indictment charging petitioner with conspiracy to commit health care fraud, health care fraud, and making false statements relating to health care matters. After a jury trial, petitioner was convicted on all counts. Pet. App. B6-B8.

At sentencing, the district court determined that petitioner's total offense level was 18, which reflected a base offense level of six, increased by ten levels for the amount of loss, and increased by an additional two levels because petitioner had abused his position of trust as a Blue Cross provider. 9/1/06 Sent. Tr. 75-77; see Presentence Report ¶¶ 49-50, 52. That offense level, with petitioner's criminal history category of I, resulted in an advisory Sentencing Guidelines range of 27 to 33 months of imprisonment. 9/1/06 Sent. Tr. 78.

Petitioner's counsel urged the court to impose a below-Guidelines sentence, arguing that the tests petitioner had ordered "did serve some benefit" and that petitioner was a "dedicated physician" who had been taken advantage of by Noble. 9/1/06 Sent. Tr. 83-90. During his allocution, petitioner stated that he had "trusted" Noble and had "believed that what I was doing was okay." *Id.* at 99-100. The government asked the court to sentence petitioner within the Guidelines range. The government noted that petitioner had signed more than 400 orders for patients to undergo tests even though petitioner "never saw one of those people," and that the jury had rejected petitioner's claim that he lacked fraudulent intent. *Id.* at 104-113.

After considering the pertinent factors under 18 U.S.C. 3553(a), the district court concluded that a Guide-

lines sentence was "not an appropriate sentence" and sentenced petitioner to five years of probation. 9/1/06 Sent. Tr. 125-126. The court found that petitioner had been motivated to participate in Noble's scheme because petitioner "believed in the test" and thought that it would be helpful to patients, and that petitioner, who was "naive" and "trusting," had been "hoodwinked" by Noble. *Id.* at 116-117. The court also relied on petitioner's trial testimony that his conversations with Noble and other doctors "gave him a measure of comfort about what Mark Noble was doing." *Id.* at 122-123. The court stated that petitioner's possible reliance on those conversations "militated against his having fraudulent intent." *Id.* at 123.

Acknowledging that "[t]he jury found [petitioner] had fraudulent intent," the district court concluded that it could "consider those things in sentencing despite the jury's finding." 9/1/06 Sent. Tr. 123. The court also noted that other physicians who had participated in the scheme had not been prosecuted, that petitioner had worked his way up from a "humble background" to become a successful physician, and that petitioner's loss of his medical license while he was under court supervision was "already * * * a huge price * * * for what he did." *Id.* at 118-125. The district court further observed that petitioner's medical practice was "important to his patients" and "valuable * * * to the community," and the court expressed hope that a probationary sentence would "assist in returning him to the practice of medicine at some point." *Id.* at 129-130.

3. Petitioner appealed his convictions, and the government cross-appealed his sentence. The court of appeals affirmed petitioner's convictions, but vacated his sentence and remanded for resentencing. Pet. App. B1-

B48. The court held that the sentence was "substantively unreasonable" because the district court had "relied in part on the defendant's not having had an intent to defraud in this case." *Id.* at B31-B33. The court explained that "[n]othing in § 3553(a) suggests that Congress intended that sentencing judges should rely on a defendant's innocence when the defendant has already been found guilty beyond a reasonable doubt." *Id.* at B32-B33. Although "the district court also relied on a number of factors that were either proper or arguably proper," the court concluded, its reliance on an "impermissible factor[]" that was not encompassed within Section 3553(a) required a remand for resentencing. *Id.* at B32-B33, B35-B36.

Judge Martin dissented in part, arguing that the majority had "mischaracteriz[ed] * * * the district court's reasoning." Pet. App. B37-B38 (concurring in part and dissenting in part). Based on the district court's statements at sentencing, Judge Martin concluded that the court had not relied on petitioner's "innocence" but had "merely found [petitioner] less culpable than other defendants and sentenced him accordingly." *Id.* at B37-B42. In Judge Martin's view, this Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007), required that petitioner's sentence be affirmed. Pet. App. B43-B46.

ARGUMENT

Petitioner contends (Pet. 18-29) that the standard applied by the court of appeals in reviewing his sentence for unreasonableness is inconsistent with this Court's decisions in *Gall* v. *United States*, 128 S. Ct. 586 (2007), and *Kimbrough* v. *United States*, 128 S. Ct. 558 (2007).

Petitioner is mistaken, and further review is unwarranted.

1. The court of appeals vacated petitioner's sentence and remanded the case to the district court for resentencing. Pet. App. B3, B36. Its decision is therefore interlocutory, a posture that "of itself alone furnishe[s] sufficient ground" for the denial of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari).

The interlocutory character of the court of appeals' decision provides a particularly sound reason for denying review under the circumstances of this case. The decision was based on the sentencing court's reliance on a factual finding that petitioner lacked fraudulent intent. See Pet. App. B32-B35. As the court of appeals noted (*id.* at B35), however, the district court also based the downward variance "on a number of factors that were either proper or arguably proper." The Sixth Circuit also observed that, under *Gall*, the court of appeals "accord[s] great deference to district court sentencing determinations," and it stated that the disparity between petitioner's sentence of probation and the Guidelines advisory range of 27 to 33 months of imprisonment "is not enough to conclude that the sentence is unreasonable." *Ibid.*

At present, petitioner's resentencing has been stayed pending resolution of his certiorari petition. 9/8/08 Dist. Ct. Order. It is quite possible that petitioner will receive the same sentence on remand even if the court of

appeals' decision stands. That occurrence would render moot any issue as to the reasonableness of petitioner's original sentence.

2. In any event, the court of appeals correctly applied the abuse-of-discretion standard for appellate review of sentencing decisions, see *Gall*, 128 S. Ct. at 594, when it concluded that the district court's determination that petitioner lacked fraudulent intent was an "impermissible" sentencing consideration. As the Court explained in *Gall*, a court of appeals reviews a sentence under a two-step procedure. The court of appeals "must first ensure that the district court committed no significant procedural error." *Id.* at 597. Second, "[a]ssuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Ibid.* In reviewing petitioner's sentence for unreasonableness, the court of appeals explicitly stated that it was applying "the limited abuse-of-discretion review prescribed by *Gall*." Pet. App. B31; see *id.* at B35 (noting that *Gall* "directs us to accord great deference to district court sentencing determinations under the abuse of discretion standard").

Contrary to petitioner's assertion (Pet. 22), the court of appeals did not improperly "label as categorically 'impermissible'" a factor that was "within the district court's charge under § 3553(a)." Rather, the court held that Section 3553(a) does not authorize a district court to rely on a determination that the defendant is not guilty of the charge on which he was convicted. Pet. App. B32-B33. This Court has never suggested that sentencing courts have unlimited authority to consider factors that are not specifically enumerated in Section 3553(a). See *Gall*, 128 S. Ct. at 596 & n.6 ("Section 3553(a) lists

seven factors that a sentencing court must consider."); see also, *e.g.*, *United States* v. *Tapia-Romero*, 523 F.3d 1125, 1127-1128 (9th Cir. 2008) (cost of imprisonment is not a valid factor under Section 3553(a)). And while a sentencing court may properly conclude, based on the "nature and circumstances of the offense," 18 U.S.C. 3553(a)(1), that a particular defendant is less culpable than others convicted of similar crimes, nothing in Section 3553(a) authorizes the court to take into account its own disagreement with the jury's verdict about whether the defendant is guilty of the offense at all.[1]

As the court of appeals explained (Pet. App. B33-B35), the district court's statements at sentencing suggest that the court concluded that, "despite the jury's finding," evidence at trial "militated against [petitioner's] having fraudulent intent." 9/1/06 Sent. Tr. 122-124.[2] The district court's conclusion that petitioner lacked fraudulent intent—which would have absolved petitioner of guilt of the fraud offenses—is not a factor encompassed by Section 3553(a), and the court's reliance on that consideration therefore rendered its sentence

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[1] There is no merit to petitioner's suggestion (Pet. 22-26) that the court of appeals' decision in this case is inconsistent with other Sixth Circuit decisions that have "discussed substantive review without referring to 'impermissible factors.'" None of the cases on which petitioner relies involved a sentencing court's reliance on a finding that contradicted the jury's verdict. Moreover, even if the ruling below conflicted with other Sixth Circuit decisions, an intracircuit conflict ordinarily is not an appropriate basis for review in this Court. See Sup. Ct. R. 10; *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[2] Petitioner asserts (Pet. 29), as the dissenting judge argued (Pet. App. B37), that the district court "did not, in fact, rely" on petitioner's "innocence." To the extent that petitioner is challenging the court of appeals' interpretation of the district court's reasoning, that record-bound contention does not warrant further review.

unreasonable. See Pet. App. B33, B35 (court of appeals "would not hesitate to reverse a sentence if a judge relied on numerous relevant facts but also relied, for instance, on the morning's horoscope").

Contrary to petitioner's contention (Pet. 21-22), the court of appeals' conclusion that the district court relied on an impermissible factor does not conflict with this Court's decision in *Kimbrough*. In *Kimbrough*, the Court held that "it would not be an abuse of discretion for a district court to conclude" that the disparity between the Sentencing Guidelines' treatment of crack and powder cocaine offenses "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." 128 S. Ct. at 575. Nothing in *Kimbrough* suggests that a sentencing court may take into consideration factors that are not embraced by Section 3553(a). Petitioner correctly points out (Pet. 21) that, under *Kimbrough*, district courts may vary from the advisory Guidelines ranges "even as a matter of policy." See *Kimbrough*, 128 S. Ct. at 570; *Spears* v. *United States*, 129 S. Ct. 840, 843 (2009) ("[T]he point of *Kimbrough* * * * [was] a recognition of district courts' authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them."). In this case, however, the district court gave no indication that its sentencing decision was based on a policy disagreement with the Guidelines. The decision in *Kimbrough* is therefore inapposite here.

The court of appeals also correctly held (Pet. App. B32) that the district court's finding that petitioner lacked fraudulent intent was contrary to the jury's verdict and therefore "clearly erroneous." As the court of appeals explained, "a factual determination is necessarily clearly erroneous where a jury has previously found

to the contrary beyond a reasonable doubt." *Ibid.*; see *United States* v. *Curry*, 461 F.3d 452, 460-461 (4th Cir. 2006) (district court erred in sentencing defendant "based on a conclusion that contravened the jury's verdict"); *United States* v. *Rivera*, 411 F.3d 864, 866 (7th Cir.) (finding it "unnecessary and inappropriate" for the sentencing judge to "reexamine, and resolve in the defendant's favor, a factual issue that the jury has resolved in the prosecutor's favor beyond a reasonable doubt"), cert. denied, 546 U.S. 966 (2005); *United States* v. *Hourihan*, 66 F.3d 458, 465 (2d Cir. 1995) ("[A] guilty verdict, not set aside, binds the sentencing court to accept the facts necessarily implicit in the verdict.") (quoting *United States* v. *Weston*, 960 F.2d 212, 218 (1st Cir. 1992)), cert. denied, 516 U.S. 1135 (1996). In finding petitioner guilty of health care fraud, the jury necessarily determined beyond a reasonable doubt that petitioner had "acted with intent to defraud," Jury Instructions 37-38 (Dec. 15, 2005); see Pet. App. B21-B25 (summarizing evidence of petitioner's fraudulent intent), and the sentencing court was bound by that finding.

Petitioner acknowledges (Pet. 27-28) that "a sentence based on clearly erroneous facts is subject to reversal." He notes, however (Pet. 28), that while the court of appeals concluded (Pet. App. B31) that his sentence was "substantively unreasonable," this Court has cited a district court's "selecting a sentence based on clearly erroneous facts" as an example of "procedural error." *Gall*, 128 S. Ct. at 597. Petitioner's contention that the court of appeals mistakenly labeled the district court's error as "substantive," rather than "procedural," does not raise a question of broad significance that would warrant resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2009